Supreme Court, U.S.
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No. _____

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In The

Supreme Court of the United States

October Term, 199_

Ralph P. Forbes,

Petitioner

vs.

AETN-TV, KHOG-TV, *et al.*,

Respondents

On Petition for Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Ralph P. Forbes,
Citizen In His Own Proper Person
Box 88
London AR 72847
501/293-4641

QUESTIONS PRESENTED FOR REVIEW

- I -

Whether the Court of Appeals erred in not exercising ırisdiction and judicial duty to determine if the F.C.C.'s rocedures meet: A] statutory requirements for 1] purpose;] timeliness; 3] reasonableness; and, 4] lawful authority;

And B] the constitutional mandates *re* due process, qual protections, expression and all rights explicitly and nplicitly protected by the Law of the Land, the Constitu- on and the First, Fifth, Seventh, Ninth and Fourteenth mendments thereto?

- II -

Whether it is unreasonably burdensome to require etitioner to pursue alleged administrative "remedies" hen the procedural process: A] has been exhausted by ef- ctual final order and/or unreasonable agency delay; B] is ot an adequate remedy at law to redress injuries; C] has roven incompetent and inadequate to protect the vital onstitutional rights of the petitioner, political candidates general, and the bedrock, "paramount" rights of the eople; and, D] is an exercise in futility?

- III -

Assuming that the Court of Appeals was correct as to oints number I and II, whether the exhaustion of an ad- inistrative complaint with the F.C.C. is a prerequisite for Plaintiff seeking to utilize 42 U.S.C. §1983 and/or §1985(3) vindicate rights under 47 U.S.C. §312 and/or §315(a)?

- IV -

Whether the Court of Appeals erred in holding that e Petitioner's Complaint did not state a cause of action nder 42 U.S.C. §1983 and/or §1985(3)?

PARTIES TO THE PROCEEDING

RALPH P. FORBES, INDEPENDENT CANDIDATE NOMINATED BY THE PEOPLE, QUALIFIED VOTERS TO REPRESENT THEM IN THE UNITED STATES CONGRESS FROM THE 3rd CONGRESSIONAL DISTRICT OF ARKANSAS

PETITIONER

- vs. -

THE ARKANSAS EDUCATIONAL TELEVISION COMMISSION NETWORK FOUNDATION, ITS BOARD OF DIRECTORS, AND EMPLOYEES, IN THEIR OFFICIAL CAPACITIES;

THE ARKANSAS EDUCATIONAL TELECOMMUNICATIONS AND ITS MEMBERS AND OFFICERS;

SUSAN J. HOWARTH, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR;

VICTOR FLEMING, IN HIS OFFICIAL CAPACITY AS CHAIRMAN;

G.E. CAMPBELL, IN HIS OFFICIAL CAPACITY AS VICE-CHAIRMAN;

Dr. CAROLINE WHITSON, IN HER OFFICIAL CAPACITY AS SECRETARY;

COMMISSIONER DIANE BLAIR,
IN HER OFFICIAL CAPACITY;

COMMISSIONER S. McADAMS,
IN HIS OFFICIAL CAPACITY;

COMMISSIONER JAMES ROSS,
IN HIS OFFICIAL CAPACITY;

COMMISSIONER JERRY McINTOSH,
IN HIS OFFICIAL CAPACITY;

PARTIES TO THE PROCEEDING

COMMISSIONER LILLIAN SPRINGER, IN HER OFFICIAL CAPACITY;

AMY L. OLIVER, IN HER OFFICIAL CAPACITY AS PRODUCTION MANAGER;

WILLIAM CLINTON, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF ARKANSAS;

aka AETN (THE AETN-TV DEFENDANTS);

AND,

COMMERCIAL TELEVISION BROADCASTING STATIONS KHBS TV/CHANNEL 40 UHF, FORT SMITH, ARKANSAS; ITS AFFILIATE KHOG TV/CHANNEL 29 UHF, FAYETTEVILLE, ARKANSAS; SIGMA BROADCASTING, INC.; THE AMERICAN BROADCASTING COMPANY aka ABC; AND THEIR AGENT DARREL CUNNINGHAM;

aka KHOG (THE KHOG-TV DEFENDANTS);

RESPONDENTS

+

AMICUS (BELOW)

THE FEDERAL ELECTION COMMISSION aka F.C.C.

THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS, NATIONAL PUBLIC RADIO, THE ORGANIZATION OF STATE BROADCASTING EXECUTIVES AND THE PUBLIC BROADCASTING SERVICE

(AMICI CURIAE)

+

INTERESTED PARTIES

AMERICAN CIVIL LIBERTIES UNION OF ARKANSAS aka ACLU

THE RUTHERFORD INSTITUTE; Etc.

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Petitioner, Ralph P. Forbes, Citizen, unschooled in law, respectfully prays that a writ of certiorari issue to review portions of the judgment and opinion of the United States Court of Appeals for the Eighth Circuit affirming the Court below, including and in particular, the paragraphs captioned "A. Statutory Claims," the holding requiring petitioner to first exhaust his administrative remedies prior to claiming redress from the defendants. (App. 6a, 7a).

OPINIONS BELOW

The April 28th, 1994, opinion of the Court of Appeals reported in *Forbes v. AETN*, 22 F.3d 1423 (8th Cir. 1994), and correlated orders appear in Appendices A ~ G to this Petition. (App. 1a ~ 28a).

JURISDICTION

The Court of Appeals' Order and Judgment in this matter was filed on April 28th, 1994. On June 14th, 1994, the petition for rehearing by the AETN appellees was denied. On June 21, 1994, appellant Forbes' petition for rehearing as to limited portions of the Eighth Circuit's Order was denied. On July 19, 1994, appellant Forbes' petition to recall mandate was denied. This Court's appellate and *sua sponte,* plenary jurisdiction is invoked under Article III; Title 28 U.S.C. §§ 1254(1); 158 & 1651; and because the Court of Appeals for the Eighth Circuit has decided an important question of federal law that petitioner believes should be reversed by this Court because it is in conflict with: [1] the Constitution; [2] applicable decisions of this Court; [3] other Circuits; and, [4] its own rulings.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

The Constitution of The United States: Article I, Sections 1 & 2; Article III, Section 2(1); Article IV, Sections 2(1) & 4; Article VI, Sections 2 & 3; Amendments I; V; VII; IX & XIV; **United States Code**: Title 5 U.S.C. § 555; § 706; 28 U.S.C. § 158; §§ 1331, 1332; § 1343; § 1357; § 1651; §§ 2201, 2202; § 2342; 42 U.S.C. § 1973(j)(f); §§ 1983, 1985 (3) & 1986, *et seq.*; 47 U.S.C. §§ 312 (a)(7), 315; & § 402;

Federal Communications Commission (FCC): CFR 73.1941(a); 1944 (a)(b); FCC 8210-AJZ/MJM, *Pepper Letter*, 21 August, 1992; DA 92-1503, *Becker Letter*, October 30, 1992; *Request for Declaratory Ruling Concerning Access to Time on Broadcast Stations*, 25 F.C.C.2d 216 (1970); *Testimony of Federal Communications Commissioner to United States Senate Subcommittee on Communications*, (1969); *Joint Appendix 69 of the FCC*; pertinent parts of which appear in Appendices H ~ J. (App. 29a ~ 52a).

STATEMENT OF THE CASE OVERVIEW

The gravamen of the case is *censorship of protected speech,* and unlawful discrimination, by two groups of defendants in two distinct, albeit related torts. The grounds for appeal are the inadequacies of administrative procedures:

(1) to protect fundamental rights in the first instance;

And (2) to provide redress after the failure to prevent irreparable harm. The Circuit Court's narrative of the case is concise and well recited; and petitioner respectfully calls the Court's attention to the Appendix at pages 2a ~ 11a; 72a ~ 81a; 152a ~ 158a; 196a, 197a; 210a; & 214a, *et seq*.

The AETN Defendants: In the 1992 election cycle, the major debates, *purportedly for purposes of informing the Arkansas electorate of candidates and their positions on issues,* were staged, sponsored and paid for *by the state* via The Arkansas Educational Television Commission Network Foundation, *aka* AETN. Invoking his rights under the aegis of the 1st and 14th Amendments to the United States Constitution; 47 USC 315; the Arkansas State Constitution and the federal and state laws governing AETN; petitioner Forbes informed defendants that he was a legally qualified candidate for United States Congress and respectfully requested his rightful place in the state-staged debates, scheduled for October 22nd, 1992. (App. 54a). AETN refused to allow the people to hear Forbes and his views; whereupon Forbes appealed to the FCC. The FCC told Forbes *not to "waste" his and everyone else's time,* because he would ultimately, *inevitably* be turned down; *but the FCC's procedures could not be exhausted until long after the debate and the election*

would be over. (App. 58a). Forbes thereupon wrote a letter requesting the FCC to bypass or short-circuit their fatal procedures and *unreasonable agency delay,* so Forbes would have *a timely* denial to appeal to a court of law. (App. 62a). [1]

The belated FCC response claimed: (1) to have no knowledge of the petitioner's call; and (2) to contain a "political package" on FCC procedures. There were *no* enclosures. (App. 63a).

When it became apparent that the FCC had *de facto* made its *final decision* by failing to mandate AETN to comply with the law; Forbes, knowing no other adequate remedy under law, filed a complaint (praying leave to amend because of exigencies) with a petition for emergency injunctive relief, in the United States District Court. (App. 72a; 75a, ¶10; 80a, ¶36).

While it is true our courts are overburdened; and, *in theory*, competent, efficient, law abiding administrative agencies *should* relieve much load from our judiciary: *the reality is the FCC's unreasonable delays, improperly withheld relief and 100% failure to protect the paramount rights of the people and the rights of individual citizens, results in excessive litigation.*

In stark contrast to the FCC's putative "comprehensive mechanism for remedy and enforcement of federal rights"

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[1] "Because of the *time limitation inherent* in a political campaign, erroneous (censorship) decisions by a station (must be) be corrected ... *promptly enough to permit the candidate to bring improperly excluded matter before the public (prior to the election).*" (Italics supplied.)
WDAY, infra, 360 U.S. at 530, 79 S.Ct. at 1306; (App. 126a; 199a, 200a; 212a).

"[T]he Court upheld the right of access for federal candidates imposed by § 312(a)(7) of the Communications Act both because that provision 'makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process,' ... "
F.C.C. v. L.W.V. of California, 468 U.S. at 379, 104 S.Ct. at 3117

This honorable Supreme Court *unanimously* held: *"It is the right of the viewers and listeners,* not the right of the broadcasters *which is paramount."*
Red Lion, 395 U.S. at 390; 89 S.Ct. 1806; 23 L.Ed.2d 371 (1969)

"It is particularly important that candidates have the ... opportunity to make their views known so that the electorate may intelligently evaluate the candidate's personal qualities and positions on vital public issues *before* choosing among them on election day." *Buckley v. Valleo,* 424 U.S. at 52, 53.
(Please see, *e.g.,* App. 82, 83a; 103a, 104a; 148a, 149a; *cf.* 199a.)

(denial of due process, and *utter failure* to act on petitioner's complaints for *two years);* petitioner Forbes's motion for relief *in the courts* resulted in one *ex parte* hearing, a hearing before a single Appellate Judge, *and* a Three Judge Appellate Panel, *all within 48 hours prior to the October 22nd debate.*

(*cf.*, App. 67a, 68a; 101a; 185a; 187a, ¶9; 212a).

The KHOG Defendants: As the election day, November 3, 1992, drew near, and AETN's hostility and invidious censorship, shielded by FCC inaction and antagonism, had denied the people their paramount right to hear Forbes' views;

Petitioner Forbes' only reasonable option to exercise his rights of free expression, to present his views (if only in a condensed and abbreviated form) to the voters was to run 30 second spot ads on the six commercial television broadcasting stations in Arkansas' 3rd congressional district. After viewing the tapes, the management of all six stations admitted the ads were very effective; but they objected to Petitioner Forbes' views and the potent way he expressed them. [2]

Because of limited funds the spots were scheduled to run only during *the critical last weekend* before the November 3rd election, beginning Friday evening, October 30th, 1994.

THE CENSORED AD objected to most vehemently by the defendants consisted of quotes from *The Holy Bible* and the author of our *Declaration of Independence.*

(Please see App. at 52a and 53a.)

The agreement with the ABC stations was made with K-HOG-TV 29 in Fayetteville, but they requested that Petitioner Forbes deliver the video cassettes to their Fort Smith sister station on Friday afternoon, just prior to the scheduled broadcasts. The KHOG/KHBS defendants stalled Forbes until *after* the FCC offices closed *for the weekend.* Then defendant Cunningham announced Forbes' political ads were banned as "obscene." He claimed to be acting under color of a

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[2] The ABC affiliates, owned by Sigma Broadcasting, Inc., KHOG-TV 29 of Fayetteville and KHBS-TV 40 of Fort Smith; NBC affiliates, KPOM-TV 24 of Fort Smith and KFAA-TV 51 of Rogers; and CBS affiliate KFSM-TV 5 of Fort Smith and its sister station in Fayetteville, Ark.

last minute FCC ruling issued in the Becker case.[3]
(App. 48a, 177 ~ 180a, 185a).

As a matter of fact and law, not only was the Becker case irrelevant to and disparate from the ads of Forbes and others with similar views, content and expression; but the Becker letter specifically prohibited and enjoined defendants Cunningham, KHOG & KHBS, and all other licensees from censoring the ads of Forbes or any candidate with ads of cognate content. (App. 44a; 144a, 145a; 173a, 174a).

The FCC failed to protect Forbes and the voters of Arkansas' third district from suffering irreparable harm to their most vital and fundamental rights. Therefore Forbes was forced by defendants to lodge this Action as *the only adequate remedy for redress at law.* Forbes immediately amended the complaint to include the KHOG defendants for censoring his ads. (Please see App. 76~81a; 210a~213a.)

On November 2, 1992, candidate Forbes sent a letter to Mr. Milton Gross of the FCC complaining of the unlawful, invidious, arbitrary, capricious and malicious censorship of his protected ads by the KHOG defendants. (App. 67a.)

The FCC was sufficiently aware of and motivated by this case so that on August 17, 1993, the FCC filed an amicus brief in the Eighth Circuit vigorously opposing petitioner on behalf of the defendants in this matter.
(Please see App. 168a ~ 195a; 218a.)

On June 28th, 1994, Petitioner Forbes wrote to Mr. Gross asking about the status of his November 2, 1992, complaint. Mr. Gross replied in a letter dated July 19, 1994, which disingenuously claimed the FCC was *unaware* of Forbes' complaints. Once *again* the materials claimed to be enclosed from the FCC were not. The letter adds, "*all the complaints in this area which we have received from a num-*

[3] The Forbes and Bailey footage were specifically declared *not* indecent by the FCC. The FCC's October 30th Becker letter, published at *the close of the business week,* was used as a pretext by television stations *all over the nation to ban political ads* of numerous candidates who shared Forbes' views *during the final critical 72 hours* before the 1992 elections, in violation of 47 C.F.R. § 73.1944(b). (App. J, 44a; 185a; 225a).

ber of candidates in various jurisdictions" are being held "in abeyance" until the Commission releases its decision on the issues raised by the Notice. (App. 68a, 69a). [4]

While it is incontestably true that [1] the FCC should have *immediately* required the KHOG defendants to run candidate Forbes' scheduled ads *without censorship;*

And, [2] the FCC should have penalized the KHOG defendants severely enough so that neither they nor any other licensees would violate Forbes' or any other candidate's rights, and especially not rape the paramount rights of the public, in any future elections. But it is a *non sequitur,* and patently unjust, to penalize Forbes *because the FCC failed to act in an appropriate and timely manner.*

ADMINISTRATIVE vs. JUDICIAL JURISDICTION

Petitioner Forbes maintains his complaint is proper under 28 USC §§ 1331 {*e.g., Public Citizen Health Research Group v. Commissioner. Food & Drug Administration ("PCHRG v. FDA")*, 740 F.2d at 34-35}, 1343, 1357, 2201, 2202; 42 USC §§ 1973, 1983, 1985, *et seq.*, so that original jurisdiction lies with trial by jury in Article III District Court rather than the self-contradictory, administrative labyrinth as more fully shown herein. [5]

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[4] This practice is aptly nailed by what a three judge panel in the 8th Circuit labeled, in another voters' rights case (*Jeffers v. Clinton*), an unlawful "SPP" {aka *"standard practice and procedure"}, that is imposed or applied "in a manner which results in a denial or abridgement of the right of any citizen ..."* *cf., MacBride v. Exon,* 558 F.2d 443 at 449 (8th Circuit, 1977) (App. 235a).

"... But review of the order by *a licensee* in *such a proceeding affords no adequate remedy.* If ever instituted, which is uncertain, *it would come too late to save appellant from the injury wrought by the outlawry of its contracts."* *Columbia Broadcasting System, Inc. v. United States (CBS v. U.S.),* 316 U.S. at 424, 62 S.Ct. at 1203, 86 L.Ed 1563 (1942)

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[5] "... Forbes' remedy for a violation of his constitutional rights would be a suit in federal court, *not* an administrative procedure before the FCC. *Kokinda,* 110 S.Ct. 3115; *Perry,* 460 U.S. at 49, 103 S.Ct. at 957; *Cornelius,* 473 U.S. at 788, 105 S.Ct. 3439; *Lehman v. City of Shaker Heights,* 418 U.S. 298, 94 S.Ct. 2714 (1974)." Respondent's Brief in Opposition at 8, *AETC v. Forbes,* No. 94-490, *cert den.*

Dante may well have had a vision of the FCC's bureaucratic, labyrinthine ways when he wrote: *"All hope abandon, ye who enter here."* Petitioner denies and at all times has objected to the extort that the FCC has any lawful authority over him or his rights as a United States Citizen. Assuming, *arguendo*, that petitioner is required to continue to exhaust his fruitless FCC remedies before he can proceed, petitioner makes the following additional arguments:

If Petitioner Forbes' remedy lies first within the FCC maze, although he is an aggrieved person, manifestly his status in not under 47 USC § 402(b). If § 402(a) applies, then 28 USC §158 is triggered. Obviously, this is not a bankruptcy case, so only the district court and court of appeals jurisdiction portions apply; which means Forbes must appeal to the district court, which he did when he filed his complaint, and appeal from there to appellate court, from which he now appeals. [6] It is well settled that where a case involves questions of importance to administration of the Communications Act, the Supreme Court of the United States would grant certiorari. *FCC v. Allentown Broadcasting Corp.*, 349 U.S. at 365, 75 S.Ct. at 859 (1955)

This Court long ago recognized: *Justice delayed is justice denied.* It is unreasonable to require Petitioner Forbes to go through the futile ritual of exhausting so-called administrative "remedies" with the FCC (*e.g.*, Appendices U & V, 82 a~140a) for each and all of the following additional reasons:

While Forbes is not under the jurisdiction of the FCC; 5 USC §555 does impose *a due process obligation on the FCC* "to conclude a matter presented to it" *"within a reasonable time"* and with *"due regard for the ... necessity of*

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[6] Under this theory, *the 8th Circuit's remand is in direct conflict with the law of the Court of Appeals, D.C. Cir.*, which declares: *exclusive jurisdiction lies in the Court of Appeals. TRAC v. FCC*, 750 F.2d at 75 (1984) & *ALPA*, 750 F.2d 81. (App. 38a; 42a; 175a; 181a; 218a, 219a).

Even absent explicit judicial review provisions, there is always a "strong presumption" that agency action is reviewable. *Dunlop v. Bachowski*, 421 U.S. 560, 567, 95 S.Ct. 1851, 1857, 44 L.Ed.2d 377 (1975)

the parties" and to give "*prompt notice*" *of denial* "*in whole or in part*" of a "written application, petition, *or other request* of an interested person made in connection with *any* agency proceeding." (App. 37a; 58 ~ 69a).

If Forbes is not yet free from inadequate, incompetent and inapplicable administrative entanglements, then he invokes 5 USC § 706 *in its entirety* coupled with 28 USC § 1651 and 28 USC § 2072 to petition this honorable Court to use its plenary powers to protect his God-given, statutory and due process rights secured by the Constitution of the United States, including the First and Fourteenth Amendments thereto. (App. 29a ~ 31a; 32a ~ 34a; 43a). [7]

TIMELY PROCEDURE IS REQUIRED TO PROTECT AGAINST PRE-ELECTION CENSORSHIP

This Court proscribed censorship of protected political expression, whether by government control over private licensees, or *by private licensees invoking governmental regulation as a guise* or a cloak in *Farmers Educational & Coop. Union, etc. v. WDAY (WDAY)*, 360 U.S. 525, 79 S.Ct. 1302, 3 L.Ed.2d 1407 (1959):

"... The term censorship, however, as commonly understood, connotes *any* examination of thought or expression in order to prevent publication of 'objectionable material.' " (Emphasis in original; *WDAY* at 79 S.Ct. 1304 & 360 U.S. 527.)

"... [J]udicial interpretations of § 315 have with considerable uniformity recognized that a licensee has no such power. . . Similarly, the legislative history of the measure both prior to its first enactment in 1927, and subsequently, shows a deep hostility to censorship either by the Commission or by a licensee. 6

"6. See S.Rep. No. 1567, 80th Cong. 2d Sess. 13-14 (1948), where discussing S. 1333, the Committee Report stated:

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[7] Just as the FAA enforcement manual handbook was written to guide the FAA staff *but not intended to affect the rights, duties or conduct* of pilots; so *47 USC 315 prohibits* the FCC *and broadcasters* from *censoring* expression, *its purpose* is *not* to infringe or annul, *but to protect* the rights of candidates and the paramount right of the people to be informed. *cf. Capuano v. National Transportation Safety Board*, 843 F.2d 56 (1st Cir. 1988).

> " ' The flat prohibition against the licensee of any station exercising any censorship authority over any political or public question discussion is retained and emphasized. This means that the Commission cannot itself or by rule or regulation require the licensee to censor, alter, or in any manner effect or control the subject manner of any such broadcast and the licensee may not in his own discretion exercise any such censorship authority. * * *
>
> * * * * *
>
> " '... the ... act . . . makes clear that the Commission has absolutely no power of censorship over radio communications and that it cannot impose any regulation or condition that would interfere with the right of free speech by radio.' "
>
> *WDAY*, 79 S.Ct. at 1305, 360 U.S. at 528

"... Recognizing radio's potential importance as a medium of communication of political ideas, Congress sought to foster its broadest possible utilization by encouraging broadcasting stations to make their facilities available to candidates for office without discrimination, and by insuring that these candidates when broadcasting were not to be hampered by censorship of the issues they could discuss. Thus, expressly applying this country's tradition of free expression to the field of radio broadcasting, *Congress has from the* [530] *first emphatically forbidden the Commission to exercise any power of censorship over radio communication.*[7] *It is in line with this same tradition that the individual licensee has consistently been denied 'power of censorship' in the vital area of political broadcasts.*" {Italics supplied; n. 7 omitted.}

WDAY, 79 S.Ct. at 1305, 360 U.S. at 529-30

"... Such issues have always troubled courts. Yet, under {FE&CU}'s view of the statute they would have to be resolved by an individual licensee during the stress of a political campaign, often, necessarily, without adequate consideration or basis for decision. Quite possibly, if a station were held responsible for the broadcast of libelous material, all remarks even faintly objectionable would be excluded out of an excess of caution. Moreover, if any censorship were permissible, a station so inclined could intentionally inhibit a candidate's legitimate presentation *under the guise* of lawful censorship of libelous matter. *Because of the time limitation inherent in a political campaign, erroneous decisions by a station could*

not be corrected by the courts promptly enough to permit the candidate to bring improperly excluded matter before the public. It follows from all this that allowing censorship, even of the attenuated type advocated here, would almost inevitably force a candidate to avoid controversial issues during political debates over radio and television, and hence restrict the coverage of consideration relevant to intelligent [531] political decision. *We cannot believe,* and we certainly are unwilling to assume, *that Congress intended any such result.*"

WDAY, 79 S.Ct. at 1306, 360 U.S. at 530-531

"... Here, petitioner is asking us to attribute to § 315 a meaning which would either *frustrate the underlying purpose for which it was enacted,* or alternately *impose unreasonable burdens* on the parties governed by that legislation. In the absence of clear expression by Congress we will not assume that it desired such a result. . . We merely read § 315 in accordance with what we believe to be its underlying purpose." [8] {Emphasis supplied throughout.}

WDAY, 79 S.Ct. at 1308, 360 U.S. at 535

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[8] While four Justices dissented on grounds of state rights; **the Court was unanimous in decreeing that *this section (§ 315) forbids censorship by licensees.***

If the New York commission's system of notifying publishers that certain materials were found to be objectionable for sale to minors was based on "radically deficient" procedures, and therefore condemned because the "system was found to constitute an 'informal scheme of ... censorship' " ... (*Bantam Books, Inc. v. Sullivan*, 372 U.S. at 71, 72, 83 S.Ct. 631): then, the FCC's radically defective, hostile procedures that impose unreasonable burdens; that reek with disdain, rather than *"due regard for the (reasonable time) necessity of the parties"*; that *subvert "the underlying purpose for which it was enacted"* must also be condemned as a *formal* scheme of *censorship.*

If this Court's "insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards" (*Id.*, 372 U.S. at 66, 83 S.Ct. 637) is the law; then certainly the public's paramount right to be informed, and the rights of political expression by candidates are entitled to at least equally rigorous scrutiny and safeguards. *cf., Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 95 S.Ct. 1239, 44 L.Ed.2d 448 (1975); and *Atlantic Beach Casino, Inc. v. Morenzoni*, 749 F.Supp.. 38 (D.R.I. 1990)

Merits of *the Unreasonable Delay by FCC* Claim

Petitioner Forbes' inalienable constitutionally protected rights have suffered from *unreasonable delay by FCC* in response to egregious torts by both the AETN and KHOG defendants; injuries much greater to *vital* rights of natural persons, than harms to the fiscal interests of parties in *Telecommunications Research & Action Center v. FCC (TRAC)*, 750 F.2d 70 (App D.C., 1984):

"... [T]he statutory commitment of review of FCC action (*or inaction*) to the Court of Appeals, read in conjunction with the All Writs Act, 28 U.S.C. § 1651(a) (1982), affords this court jurisdiction over claims of unreasonable Commission delay ... Here, of course, there is no final order -- indeed, the lack of a final order is the very gravamen of the petitioner's complaint. This lack of finality, however, does not automatically preclude our jurisdiction. 27

"27. Although the finality doctrine does limit judicial action, it does not do so in a precise and inflexible way. As the Supreme Court has instructed in *Abbot Laboratories v. Gardener*, 387 U.S. 136, 149-50, 87 S.Ct. 1507, 1515-16, 18 L.Ed.2d 681 (1967), a federal court should apply the finality requirement in a 'flexible' and 'pragmatic' way. *See also PCHRG v. FDA*, 740 F.2d at 30. In *PCHRG* we found that the finality requirement does not preclude us from reviewing claims of unreasonable agency delay. *Id.* at 30-32."

{At n. 29 the D.C. Court of Appeals saw another danger in} unreasonable agency delay "... postponement of an unreasonable delay claim until after the agency's decision may render it moot and deprive the Court of Appeals of the opportunity to review the delay claim {Which is *precisely* what happened in Forbes' case; *e.g.*, App. 17a; 222a}, thus permitting present review under the All Writs Act."

"The Administrative Procedure Act ('APA') provides additional support for our jurisdiction here. The Act directs agencies to conclude matters presented to them '*within a reasonable time,*' 5 U.S.C. § 555(b) (1982), and stipulates that the 'reviewing court shall ... compel agency action unlawfully withheld or unreasonably delayed ....' 5 U.S.C. § 706(1) (1982) ... [S]ection 706(1) coupled with section 555(b) does indicate *a congressional view that agencies should act within reasonable time frames* and that *court's* (sic) *designated by statute to review agency actions may play an im-*

portant role in compelling agency action that has been improperly withheld or unreasonably delayed. See, e.g., PC-HRG v. FDA, 740 F.2d 21, 32 (D.C.Cir.1984)"
TRAC, 750 F.2d 70 at 76, 77, italics supp.; (App D.C., 1984)

" [11] As we have noted above, there is no doubt that this court has present jurisdiction to hear claims concerning nonfinal agency action (or inaction) that might affect our future statutory review of final agency action. ..." (*TRAC* at 79)

"[12] Claims of unreasonable agency delay clearly fall into that narrow class of interlocutory appeals from agency action over which we appropriately should exercise our jurisdiction. It is obvious that the benefits of agency expertise and creation of record will not be realized if the agency never takes action. Agency delay claims also meet Judge Leventhal's suggested criteria for our interlocutory intervention - not only is there an outright violation of 5 U.S.C. § 555(b)'s mandate that agencies decide matters in a reasonable time ... Finally and most significantly, *Congress has instructed statutory review courts to compel agency action that has been unreasonably delayed.* 5 U.S.C. § 706(1). 39

"39. In *Castle v. Pacific Legal Foundation*, the Supreme Court noted that judicial review of prolonged agency inaction may be obtained under this section of the APA. 445 U.S. 198, 220 n. 14, 100 S.Ct. 1095, 1108 n. 14, 63 L.Ed.2d 329 (1980)." (*TRAC* at 79)

"The time agencies take to make decisions must be governed by a 'rule of reason' ... the court should consider ... higher or competing priorit[ies, and] should also take into account the nature and extent of the interests prejudiced by delay."
(*TRAC* at 80); *cf.* App. 222a.

* * *

"In *MCI* we announced that:
'... the delay at issue here threatens the FCC's credibility ... Many of the same considerations that impel judicial protection of the right to a "speedy trial" in criminal cases or implementation of civil decrees with all deliberate speed are not inapposite in agency deliberations. Those situations generally involve protection of constit-

utional rights, but delay in the resolution of administrative proceedings can also deprive regulated entities, their competitors or the public of rights and economic opportunities without the due process the Constitution requires.' 627 F.2d at 340-41 (footnotes omitted)." *idem* at 80

TRAC, id. establishes: 1] lack of final order does not automatically preclude Court of Appeals jurisdiction under 28 USC § 1651 over claim that *FCC unreasonably delayed* in issuing order; 2] *court has present jurisdiction to hear claims* concerning nonfinal agency action *or inaction* that might affect future statutory review of final agency action; 3] claims of *unreasonable agency delay* fall into class of interlocutory appeals from agency action over which court exercises jurisdiction; and, 4] in light of failure to meet prior deadlines for proceedings, court retains jurisdiction. [9]

Forbes Exhausted Remedies Because *The FCC's Inaction Is Tantamount To A Final Order Of Denial*

The FCC's non-action in this case, while "negative in form" was "affirmative in substance." See *Alton R.R. v. United States*, 287 U.S. 229, 235, 53 S.Ct. 124, 126, 77 L.Ed. 275

This Court in *Rochester Telephone Corporation v. United States*, 307 U.S. 125, 59 S.Ct. 754 (1939) declared:

"'Negative' has really been an obfuscating adjective in that it implied a search for a distinction - non-action as against action - which does not involve the real considerations on which rest, as we have seen, the reviewability of Commission orders within the framework of its discretionary authority and within the general criteria of justiciability." *Rochester,* 307 U.S. at 141, 59 S.Ct. at 762

"... It seems capricious that the fact that the Commis-

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[9] *cf. Lehigh Portland Cement Co. v. Federal Trade Com.*, (1969, CA4) 416 F.2d 971; *Texas Petrochemicals Corp. v. NLRB*, (1991, CA5) 923 F.2d 398; *Cal-Almond, Inc. v. Yeutter*, (1991, ED Cal) 756 F.Supp. 1351; *cf. La Bonne v. Heckler*, (1983, DC Minn) 574 F.Supp.... 1016, dismissd without opp. (CA8 Minn) 732 F.2d 161 and later proceeding (DC Minn) 580 F.Supp. 558; *Kaplan v. ITT-U.S. Transmission Systems, Inc.*, 589 F.Supp... 729 (ED NY, 1984) (App. 223a).

sion's order, authorized the preservation of the status quo should block any review at all ..." n. 26., *id.* at 141 & 763

* * *

[An inaction or delay of the Commission] "maintaining the status quo is an exercise of administrative function, no more and no less, than an order directing some change in status. The nature of the issues foreclosed by the Commission's [in]action and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same. Refusal to change an existing situation may, of course, itself be a factor in the Commission's allowable exercise of discretion. In the application of relevant cannons of judicial review an order of the Commission directing the adoption of a practice might raise considerations absent from a situation where the Commission merely allowed such a practice to continue. But this bears on the disposition of a case and *should not control jurisdiction...*"

{Italics supplied by Circuit Judge FLAUM in *Maier v. F.C.C.*, 735 F.2d at 226 (1984) citing} *Rochester* at 142 & 763

"[5] The order of the Communications Commission in this case was therefore reviewable. It is not a mere abstract declaration regarding the status of the (paramount rights of the people to be informed, the rights of free expression and equal enforcements of the law of the petitioner) under the Communications Act, nor was it a stage in an incomplete process of administrative adjudication."

Rochester, 59 S.Ct. 764, 307 U.S. 143-144

(The FCC's inaction brought immediate and irreparable harm both to the public and to petitioner Forbes.)

The mere fact that the FCC fails or refuses to take action, as opposed to affirmatively taking action, does not exclude such inaction from judicial review.

See Maier v. F.C.C., 735 F.2d 220 at 226 (1984); And, *cf. n.* 6:

"Similarly, it is not the label given to an order of the Commission, but rather the substance of the order, that determines whether the order is reviewable. *CBS v. U.S.*, 316 U.S. 407, 416, 62 S.Ct. 1194, 1199, 86 L.Ed. 1563 (1942)."

Where administrative inaction is the equivalent of an order denying relief, *jurisdiction lies in the Court of Appeals.* *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1098-99 (D.C.Cir. 1970)

And plaintiff has standing because agency *inaction* as well as action is cognizable under 5 USC §706.

Hardy v. Leonard, 377 F.Supp. 831 (1974, ND Cal)

"That the FCC's (stonewalling) here is not called an 'order' is of course no obstacle. (Even where *a letter* 'imposes no immediate obvious sanction,' it is a 'substantial cloud' that is at least 'some modicum of injury, some concrete effect;' *it is) enough to establish a present effect sufficient to make the letter a final order ripe for review on the petition ... United States v. Storer Broadcasting*, 351 U.S. 192, 76 S.Ct. 763, 100 L.Ed 1081 (1956), *CBS v. U.S.*, 316 U.S. 407, 62 S.Ct. 1194, 86 L.Ed 1563 (1942)." {Italics supplied.} *Straus Communications, Inc. v. F.C.C.*, 530 F.2d at 1006-1007 (1976)

"This Court has said that '*to be final an order must "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process ..."*'"

Illinois Citizens Cmte. for Broadcast v. F.C.C., 515 F.2d at 402; {Italics supplied.}

The FCC's foot dragging and refusals deny the rights asserted under the 1st, 5th & 14th Amendments and 47 USC §312 & §315: (1) relegating petitioner Forbes and all non-insider candidates to a class of non-persons with no recognizable, nor enforceable rights; and (2) reduces the public to mere insignificant chattel; the people are stripped of legal relevance, a *de facto* revocation of citizenship, an administrative declaratory judgment against status without due process.

The sovereign source of political and constitutional governance is utterly disregarded by those charged with preserving popular government by consent under law; [10]

Therefore, *FCC denials and inaction are final orders* within the meaning of 28 §USC 2342(1) (1970). (App. 27a).

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[10] If citizens are denied, by government countenance, information needed to cast informed ballots, are they not denied representative government? If they are then taxed, is that not violative of the XIIIth amendment?

Rigorously, when the FCC argued as amicus against Forbes and his complaint, *the FCC* de facto *and* de jure *made its decision* for the AETN and KHOG Defendants *against Forbes and his cause.*

"... The particular label placed upon it (an 'order') by the Commission is not necessarily conclusive, *for it is the substance of what the Commission has purported to do and has done which is decisive. Powell v. United States*, 300 U.S. 276, 284, 285, 57 S.Ct, 470, 474, 475, 81 L.Ed. 643; *A.F. of L. v. Labor Board*, 308 U.S. 401, 408, 60 S.Ct. 300, 303, 84 L.Ed. 347. {Italics supp.} *CBS v. U.S.*, 316 U.S. at 416, 62 S.Ct. at 1200, 86 L.Ed 1563 (1942) [11]

The instant case is beyond a *threat* of irreparable injuries to *pecuniary* interests; irreparable injuries to far more precious stakes and rights have already been inflicted; and there exists the *certainty* that these wrongs will be perpetuated and expanded until liberty as entrusted to this Court by the Nation shall be mutilated beyond all recognition. The FCC inaction and misfeasance, *re* the violations by the K-HOG and AETN defendants, has abrogated inalienable, constitutional, statutory and regulatory rights.

There are no adequate administrative remedies. Petitioner Forbes requires remedial, declaratory, injunctive and equitable relief. Therefore, in this case: "because of its peculiar circumstances, all the elements prerequisite to judicial review are present. The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control." (App. 233a, 234a).

CBS, 316 U.S. at 423, 62 S.Ct. at 1204, 86 L.Ed 1563

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[11] *CBS, id.*, is a case where allegations show a *threat* of irreparable injury to *a licensee's business*; this was *sufficient*, this Court said, to give standing for judicial review of FCC *non*-order ..." 316 U.S. 423, 62 S.Ct. 1203; *See also Western Pacific C.R. Co. v. Southern Pac. Co.*, 248 U.S. 47, 52 S.Ct. 56, 76 L.Ed. 160; *Clairborne-Annapolis Ferry Co. v. United States*, 285 U.S. 382, 52 S.Ct. 440, 76 L.Ed. 808. (App. 224a).

FUTILITY

Although, as a general principal it is true that administrative remedies must be exhausted prior to seeking judicial relief; *Rodabaugh v. Sullivan*, 943 F.2d 855 (8th Cir. 1991); *Burkey v. Government Employees Hospital Association*, 983 F.2d 656 (5th Cir. 1993); this principle is not universally and invariably true. (App. 33a; 223a ~ 225a; 231a).

In general, *exhaustion of administrative remedies will not be required where the entire undertaking would be futile.*
Smith v. Robinson, 468 U.S. at 1014 n. 17, 104 S.Ct. at 3469 (1984); *Reiter v. Cooper*, ___ U.S.___, 113 S.Ct. 1213 (1993); *Honig v. Dole*, 108 S.Ct. at 606, 484 U.S. 305 (1988); *Brown v. U.S.*, 486 F.2d 658, 661 (8th Cir. 1973); *Means v. Wilson*, 522 F.2d 833 at 837 (8th Cir. 1975). (App. 60a; 62a; 126a; 136a; 148a; 175a; 178a; 183a; 199a, 200a).

The Circuit Opinion (page 4) notes the petitioner's claim that the FCC first advised him that his application was a "waste of time" and then failed to even send the necessary forms. Clearly, such circumstances, if true, relieve the petitioner of any further necessity of seeking futile administrative relief.
State of N.Y. v. Sullivan, 906 F.2d 910, 918 (2nd Cir. 1990).

Petitioner's position is akin to that of the plaintiff in which the 9th Circuit noted: Petitioner did not bypass the {"FCC"}. The {"FCC"} bypassed him. *Castillo-Villagra v. I.N.S.*, 972 F.2d 1017 at 1024 (9th Cir. 1992).

In a similar vein, this Court has held that a federal prisoner is not required to file a futile Administrative Petition with the Bureau of Prisons. *McCarthy v. Madigan*, ___ U.S. ___, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992).

Plaintiffs are not required to make pointless charges at administrative brick walls while important rights hang in the balance.
Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1989)

THE FCC's ADMINISTRATIVE SCHEME IS INCOMPETENT TO PROTECT RIGHTS

While this Court has recognized a comprehensive statutory scheme in the Communication Act of 1934, *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 60 S.Ct. 437, 84 L.Ed 656 (1940); petitioner respectfully shows:

1) At the hearing before the Eighth Circuit *en banc,* the defendants admitted *the FCC scheme can provide no remedy nor compensation for one who has been injured by the defendants;* (App. 90a, 91a; 105a; 110a; 125a~138a; 146a; 155a; 170a-184a; 200a~206a; 212a~214a; 223a; 228a~231a).

2) There is a world of difference between the question of constructing *electrical* transmission towers, which was at issue in Pottsville; and the *electoral* system which is at the heart and core of not only the First Amendment, but the bedrock foundation of this constitutional Republic, governed by the consent of a free people, who cast their ballots *based on free and open expression* in what they deem their own enlightened self interests; [12]

3) The FCC's *primary jurisdiction* is in matters which call for *technical knowledge and expertise;* its jurisdiction is *not* (and *cannot* be) in questions affecting constitutional power that have the effect of suppressing viewpoints and silencing "wide open, robust debate on issues of public importance."
Straus Communications, v. F.C.C., (1976) 530 F.2d 1007, n. 13.

It is clear that the congressional intent of APA and FCC administrative procedures (5 U.S.C. § 555; § 706; 47 U.S.C. § 402; *et seq.*) were intended to regulate *licensees* within the FCC's *primary purpose and jurisdiction.* (App. 169a; 232a, 233a).

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[12] Even in cases related to "the fundamental purpose," the *proper* and *legitimate* role of the FCC, *administrating licensees*, the Court has held: The people as a whole retain their interest in free speech by radio (and television) and their collective right to have the medium function consistently with the ends and purposes of the First Amendment: "... *The fundamental purpose of Congress* in respect of broadcasting *was the allocation and regulation of the use of radio frequencies* by prohibiting such use except under license ... *Plainly it is not the purpose of the Act to protect a licensee ... but to protect the public.*" (Italics supplied.)

Federal Communications Commission v. Sanders Bros. Radio Station, 309 U.S. 470, 475; 60 S.Ct. 693, 697 (1940); *cf. FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 361-362, 75 S.Ct. 855 (1955)

And 4) the FCC in 1940 may have been the watchdog protecting the public's paramount rights, but it has long since metamorphosed into a silent lap dog that allows the privileged licensees to trespass and ravage the public's domain, while snarling at and attacking the rightful stewards of the land, the theoretically sovereign people. What big teeth Big Brother has; the wolf has replaced granny. [13]

First Amendment rights "must not, *in the guise of regulation,* be abridged or denied." *Hague v. CIO*, 307 U.S. 496, 516, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939)

"Freedom of the press from governmental interference under the First Amendment does *not* sanction repression of that freedom by *private* interests." *Associated Press v.* U.S., 326 U.S. 1, 20; (App. 226, 227a).

Licensees are entrusted with *technological* control, *not the power of monopoly and censorship* to decide what politically permitted speech, viewpoints and ideas may be broadcast.

They are specifically, *expressly enjoined from censoring* and unlawful discrimination; and they are positively mandated and *required* to provide the public with a full, unrestricted expanse of ideas and viewpoints. Freedom of expression is indivisible from the Republic *with Liberty and Justice for all;* it has always been the law of the land "whereof the memory of man runneth not back to the contrary."

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[13] In the Opinion at 13a, Judge McMillian states in dissent: "It may be true that the FCC is not as vigilant or as sensitive to first amendment issues as it should be." This is classic understatement; on its face it should trigger the judicial power to aroused vigilance. This Supreme Court has recognized the need for vigilance in the face of governmental regulation.

e.g., Red Lion, supra, 395 U.S. at 390. *cf., LWV*, 468 U.S. at 402, 403, 417, 104 S.Ct. at 3129, 3132, 3136; (App. 89a, 90a; 98a; 123a; 130a, 131a; 160a; 165a; 171a; 185a; 188a; 212a; 228a; 234a, 235a).

It profanes the First Amendment to mask blatant censorship behind obscene oxymorons and shameless shams, such as "*exercising first amendment duties.*" It is a wicked perversion of the intent, letter and spirit of the law to say that § 315 gives the licensee *under color of governmental rule* sanction to infringe, insult, assault, abridge and abrogate freedom of speech, (and) the right of the people ... to petition the government for a redress of grievances;" and, to deprive persons of liberty, or property, without due process of law; and to deny persons the equal protection of the laws. It "would be laughable were it not so Orwellian ..." *LWV, id.*, n. 10 at 417 & 3136.

"But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis."
NBC v. U.S., 319 U.S. at 226, 63 S.Ct. at 1014 (1943)

This strange symbiotic relationship, in which the FCC regulates the people in the interests of the licensees, rather than protecting the people by requiring the permittees to obey the law, is a case of the tail wagging the dog. On its face, the intolerable record in this case, the blatant suppression of candidate expression in 100% of the innumerable cases that come before it *every* election cycle, *the FCC provides no adequate remedy to vindicate the rights claimed.* (App. 69a; 89a; 233a, 234a). [14]

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[14] **The FCC has no credibility to be entrusted with First Amendment trust because *it has broken faith with this Court;*** and usurped powers to use interpretations of its own promulgations to overturn: its own rules; statutes enacted by legislature; *an entire progeny of cases carefully crafted by this high Court;* and overthrown the Constitution and abrogated the Bill of Rights as more fully shown at App. 84a and *passim*.

And if once upon a time there were provisions and procedures for administering the *FCC-throttled* Fairness Doctrine, which seemed to provide adequate *speedy* remedy *with timely judicial review* for the public to address the thorny issues of equity and enforcement, *and even provided* **for *private* parties *to vindicate the public interest*** (*e.g.*, *Illinois Citizens Committee for Broadcast v. F.C.C.*, 515 F.2d 397; *Maier v. FCC*, 735 F.2d at 228-9); **today there exists *no adequate remedy under administrative law* to vindicate the public's paramount rights; nor the fundamental rights of candidates in the petitioner's position.** The fairness doctrine impose(d) two duties on broadcaster: (1) it must present coverage of issues of public importance, and (2) such programming must fairly reflect differing viewpoints on controversial issues. *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 111, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 377, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969). ... *e.g., see* App. 186a.

(The FCC's) "decisions (*were*) in accord with this court's general command that 'the *essential* basis for any fairness doctrine ... is that *the American Public must not be left uninformed.' Green v. FCC*, 144 U.S.App.-D.C. 353, 359, 447 F.2d 323, 329 (1971) (emphasis in original) ..."
Public Media Center v. F.C.C., 587 F.2d 1322 at 1328 (1978)

However, even though Congress "ratified [the fairness doctrine] with positive legislation" *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 380-82, 89 S.Ct. at 1801-1802 (cited n.4, *Maier v. FCC*, 735 F.2d at 225); *the FCC unilaterally revoked this congressional and judicial approved doctrine* and has provided *nothing* to replace it to implement the FCC's statutory duty.

Please see App. 84a~94a; 189a~192a.

"Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body. ... Congress has charged the courts with the responsibility of saying whether the Commission has fairly exercised its discretion within the vagueish, penumbral bounds expressed by the standards of 'public interest.' It is our responsibility to say whether the Commission has been guided by proper considerations in bringing the deposit of its experience, the disciplined feel of the expert, to bear on applications for licenses in the public interest."

Federal Communications Com'n v. RCA Communications (RCA), 73 S.Ct. 998 at 1002, 346 U.S. 86 at 90, 91 (1953)

The courts have provided judicial relief in spite of administrative remedies in many lesser areas. Title 47 § 312 and § 315 are not merely some numbers in a bureaucratic alphabet soup, they are an attempt to protect [a] the paramount rights of the people to be informed; and [b] the rights of individual citizens to be secured by the 1st and 14th Amendments against the awesome powers delegated to privileged caretakers of the public's airwaves. [15] The FCC was created to regulate the licensees in the interests of the people, and for many years it apparently did its job well. But in recent years there appears to have been an Orwellian transmogrification so that Citizens' rights are violated, individually and collectively, by licensees; but the Citizens are denied their right to vindication in a court of law, and told they must apply pointlessly to a bureaucracy that cannot and will not redress their grievances. The First Amendment guarantees the people their right to petition our government. In this instance, the limited, restricted "right" to petition the FCC is a hollow, futile mockery.

Congress has imposed on broadcasters the obligation to "operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." *(47 USC 315)*. "The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States." *NBC*, 319 U.S. at 217, 63 S.Ct. at 1011.

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15 The Courts have held a licensed broadcaster is "granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." *Office of Comm. of United Church of Christ v. FCC*, 707 F.2d 1413 (1983); *cf., Munn v. Illinois*, 94 S.Ct. 113 (1876); (App. 101a ~ 104a).

"Similarly, in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 98 S.Ct. 2096, 56 L.Ed.2d 697 (1978), we deemed the policy of promoting the widest possible dissemination of information from diverse sources to be consistent with both the public-interest standard and the First Amendment, *id.*, at 795, 98 S.Ct., at 2112..."

FCC v. *WNCN Listeners Guild*, 101 S.Ct. 1266 at 1274, 450 U.S. 582 at 594, 67 L.Ed.2d 521 (1981) (App. 103a).

* * *

The FCC is incompetent in law and in fact to administer the fundamental, inalienable rights of the public and of the candidate exercising his right to express his views in the political market place; other than exerting its *only* constitutional and congressionally authorized power to say unto the *licensees:* **Thou shalt *not* censor!** *Thou shalt not discriminate!*

It is *prima facie* unreasonable and constitutionally repugnant to require petitioner to "exhaust" so-called administrative "remedies," to run a bureaucratic gantlet as the price he must first pay as the toll to the courthouse door to evoke his constitutionally protected rights to remedy and redress at law. No American should be condemned to the Sisyphean fate of eternally rolling boulders up *Mt. Hopeless* in the FCC's bureaucratic version of hades, as an administrative exaction for claiming inalienable, unabridgeable rights. (App. 89a).

The FCC may well be the appropriate body to resolve matters of communication policy and regulate licensees;

But the courts are the appropriate forums for resolving matters of communications law that abridge speech.

PETITIONER HAS RIGHT TO ACTION

Simply stated, a private cause of action arises for political candidates and ballot initiative petitioners under 47 USC § 315 (a) because this portion of the Communication Act of 1934 is *sui generis*. There is simply nothing else like it. Elections and referenda are at the core of the American political experience. All principal government officials, including the Justices of this honorable Court, take oath to uphold and defend this form of free, representative republican form of government by virtue of Article VI of the supreme Contract. While the courts

have historically refrained from deciding purely political issues, the ultimate reference point of any such inquiry is, of course, the Constitution. "The mere fact that a suit seeks protection of a political right does not mean it is ... non-justiciable."

Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663

"The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity *essential to the security of the Republic,* is a fundamental principle of our constitutional system."

Stromberg v. California, 283 U.S. 359, 369, 51 S.Ct. 532, 536, 75 L.Ed. 1117 (1931).

Article IV, Section 4 of the Constitution is unique in that it not only contains a grant of power from the People through the States, but an injunction. It not only permits, *it commands.* Specifically, it commands the federal government to maintain a republican form of government for each state. It is one of the rare instances in which the federal government sins by omission. This is significant because it dramatically illustrates the unique character which elections and referenda, popular republican representative government, meant to the framers. It goes without saying that federal elections, though not specifically referred to, are of no less interest. Secondly, the Communications Act of 1934, as a whole deals with a subject of transcendent importance. The mass media, particularly television, has exponentially increased the power for the dissemination of good and ill. For these reasons; because the Act deals with broadcasting generally, and because §315(a) regulates broadcasting activity in that field which is central to a democracy, free and open elections and referenda, this particular statutory provision is unique and without parallel. Elections, won or lost, can change the course of national history. Referenda can alter the direction of an entire people. For this reason, it necessarily follows: that, whatever the appropriate rule with respect to the remainder of the Act; *§315(a) permits and creates a direct private right of action,* irrespective of any ancillary avenues of relief by administrative action by the FCC.

Nor has this Court been slow to recognize such private rights in other areas, which though important, do not have

the compelling power of this subject. (App. 228a; 232a).

Thus, it is consistent with the nature, purpose and character of the Communications Act of 1934, and more specifically with §315(a) to permit the institution of a private rights action with respect to the critical areas of elections and referenda. (App. 229a).

INCONSISTENCY WITHIN CIRCUIT

The Circuit Court of Appeals rightly decided that Petitioner was not required to exhaust FCC's alleged remedies in regards to AETN's violations of rights protected by the First Amendment. But it is inconsistent to require petitioner to go through the motions of exhausting FCC "remedies" before proceeding against the KHOG defendants when the 1992 election is long over; and, in the words of the Eighth Circuit Court, "it is no longer possible for the grant or denial of preliminary injunctive relief with respect to it to have any meaning." (App. 17a).

Denying petitioner his day in court by compelling him to first exhaust his *nonexistent* FCC remedies is inconsistent with the Eighth Circuit's own case law, decisions of other circuits, as well as *stare decisis* of this Court, as more fully shown in the Appendix at 100a, 101a; 126a~130a; 138a; 171a, 172a; 202a, 203a.

PETITIONER HAS RIGHT TO ACTION UNDER 42 USC § 1983 & § 1985

The Court of Appeals holding that the District Court was correct in saying that the Plaintiff failed to state a cause of action, manifestly, is incorrect. *e.g.*, App. 116 ~ 117a; 124a; 128a; 133 ~ 134a; 138a; 200a; 205a and *passim*..

It is important to note that the Court is required, for purposes of Rule 12, to accept all pled allegations as true.

Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976);

On appeal from judgment granting a motion to dismiss the complaint in an action to enjoin enforcement of an order of the FCC, allegations of the complaint must be accepted as true.

CBS v. U.S., 316 U.S. at 414, 62 S.Ct. at 1199 (1942)

It is difficult to imagine more explicit allegations of conspiracy to deny voting rights under 42 USC §§ 1983, 1985. *e.g.*,

App. 70a; ¶¶1~9 of Complaint, 74a, 75a; 142a; 210a; 214a.

In respect both to sufficiency and unambiguity of statute, Forbes' case is virtually identical to pleadings this Court ruled on January 24, 1994 in *National Organization For Women v. Scheidler*, No. 92-780: 508 U.S. ___ (1993):

¶5: "We have held that '[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.' ... The District Court dismissed petitioners' claim at the pleading stage pursuant to Federal Rule of Civil Procedure 12(b)(6), so their complaint must be sustained if relief could be granted 'under any set of facts that could be proved consistent with the allegations.' ... {It was enough that:} DWHO and SWHO *alleged in their complaint that the respondents conspired . . .*"

¶6: "***Nothing more is needed to confer standing*** on {Forbes} **at the pleading stage.**"

¶11: "We believe *the statutory language is unambiguous,* and find in the parties' submissions respecting legislative history no such 'clearly expressed legislative intent to the contrary' that would warrant a different construction..."

¶12: " '{T}he fact that {statute} has been *applied in situations not expressly anticipated by Congress does not demonstrate ambiguity, it demonstrates breadth.' ...*" {Emphasis added; citations omitted.} (App. 128a, 133a~138a, 201a~209).

Thus, the petitioner has not only met the pleading burden for purposes of Rule 12 as to his §§ 1983/5 claims in one instance, he has met them with respect to at least three separate and distinct portions of the unambiguous language of the statutes.

Clearly, (§1983) is to be broadly construed; *Dennis v. Higgins*, 498 U.S. 439, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991).

The Court explained the purpose of the Act in *Burnett v. Grattan*, 468 U.S. 42, 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984):

"The goals of the federal statutes are compensation of persons whose civil rights have been violated and prevention of the abuse of state power." *idem*, 468 at 53, 104 S.Ct. at 2931.

Petitioner claims his rights were violated by abuse of state

power and demands compensation which the FCC is impotent to provide. Section 1983 creates a species of liability in favor of persons deprived of their federal civil rights by those wielding state authority. *Felder v. Casey*, 487 U.S. 131, 139; 108 S.Ct. 2302, 2307; 101 L.Ed.2d 123 (1988) (App. 32a & 34a; 128a).

Thus, petitioner would assert that; even if there is no general right to seek judicial redress against violations of §315(a); nonetheless that action still is maintained against those, who act under "color of law." Indisputably, this Court has upheld the Circuit Court's substantive holding that the AETN actors are Defendants; AETN claims their actions were under color of law. Because of the particularly egregious character of violations of §1983 and because of the inability and unwillingness of administrative agencies to deal with the same, a judicial cause of action should be recognized by this Court.

Petitioner would direct the Court's attention to its decision in *Golden State Transit Corporation v. City of Los Angeles*, 493 U.S. 103, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989) (*Golden State II*) in which the Court recognized an action for damages under §1983 against respondent city which violated federal law (N.L.R.A.) by conditioning renewal of a taxicab franchise upon settlement of a pending labor dispute. *The availability of administrative mechanisms to protect a plaintiff's interest is not necessarily sufficient to demonstrate that Congress intended to foreclose a §1983 remedy. Golden State II*, 493 U.S. at 106, 110 S.Ct. at 448, 449. The City did not argue, nor could it, that a §1983 action is precluded by the existence of a comprehensive enforcement scheme. Although the National Labor relations Board (NLRB) has exclusive jurisdiction to prevent and remedy unfair labor practices by employers and unions, it has no authority to address conduct protected by the NLRA against government interference.

Golden State II, 493 U.S. at 108, 110 S.Ct. at 450

Clearly, §1983 was intended to address the very kind of egregious governmental high-handedness and deprivation of rights evidenced in this case by defendants. Under these circumstances, a private right of action should be recognized.

(App. 125a~133a, 134a~137a; 175a; 229~232a).

"*We do not lightly conclude that Congress intended to preclude reliance on §1983 as a remedy for deprivation of federally secured right.*" {Italics supplied}

Wright v. Roanoke Redevelopment & Housing Authority, 479 U.S. 418 at 422, 107 S.Ct. 766 at 770 93 L.Ed.2d 781, (1987); Citing *Smith v. Robinson*, 468 U.S. 992 at 1012, 104 S.Ct. 3457 at 3468, 82 L.Ed.2d 746 (1984).

There are a plethora of cases (*e.g.*, 230a~232a), where exhaustion or remedial schemes did not bar actions under § 1983, in virtually every circuit. (App. 125a~137a; 146a~150a; 184a).

It is utterly irrelevant what the district court thinks the chances of the plaintiff might be of ultimately prevailing. That is a matter for proof at trial. Clearly, the district and circuit court were wrong with respect to §§1983 & 1985 of 42 USC. The petitioner should be and must be given his lawful date to measure his allegations against the requirements of the code. (App. 113a~126a).

* * *

Petitioner respectfully implores the Court to mark that the great import here is far beyond your petitioner *per se*'s right to speech, to equal protections, or to preserve his day in court: but of vital, supreme paramountcy is; if these rights can be taken from *any* one, they can be taken from *anyone*.

At all times, at every stage in this case, petitioner has raised the Constitution's trenchant commands as his banner and shield (*e.g.*, 160a, 234a). Is he required to turn to the FCC to vindicate his constitutionally protected rights? [16]

The FCC admits *every* election there is a large number of candidates who complain of being excluded by licensees. But of this class of candidates, petitioner is *the only one* whoever overcame the hurdles to bring this pernicious practice to the court's purview. (App. 69a; 89a; 93a; 175a; 233a, 234a).

The *real, vital* issues underlying this case are apprehended in these corollary questions:

- I -

Whether Congress, or any creation thereof, may [A] com-

[16] "... The very simple answer to that position {that the courts defer to the Commission on constitutional questions} is that *FCC regulation is designed neither to preempt judicial scrutiny nor to redress state censorship ...*" *Muir*, at 1056 (App. 89a); *Allentown & RCA*, *supra*, at 7 & 21.

pel a Citizen to *de facto* and *de jure* surrender rights expressly secured by the Constitution of the United States, under color of any statute, ordinance, regulation, custom or usage?

Or, [B] whether Congress, or any agency of government, may confer such alleged, usurped powers to others to deprive any person, class of persons - or the people as a whole - of rights, privileges or immunities secured by the Constitution and/or laws, enacted pursuant to the Constitution?

- II -

Whether [A] we the people of the United States still enjoy a constitutional Republic under law in which the representatives of the people are elected in a free and open society, *predicated upon an electorate with a bedrock right to be informed,* so that they may cast ballots based on informed consent and enlightened self interest; a government which declares the Constitution is yet the supreme law of the Land?

Or, [B] is the Republic being inexorably replaced by a totalitarian, Orwellian oligarchy, in which doublespeak procrustean, inverted interpretations of regulations overturn rules; and rules annul statutes; and this so-called "law" overthrows the Constitution? Whence all these strange convolutions and perversions of two centuries of proven principles? "Upon what meat doth this our Caesar feed, that he is grown so great?"

Why is it that state officials and *state-sanctioned, state-vested-private-actors,* as in this case, can now "legally" deny the People "information, or the means of acquiring it"?

Can all this, in Madison's words, lead to anything "but *a Prologue to a Farce or a Tragedy; or, perhaps both*" ?

- III -

After Watergate where is one courageous congressman or politician, much less a majority, who will stand in the gap to check abuse by the *nomenklatura*, an elitist, quasi-state media monopoly with unchecked power to censor, distort or fabricate popular information *to manipulate and control the people and government?* The calm, deliberations, the "advice and consent of the senate" the framers meant for the president {Article II, Sect. 2} has been reduced to disgraceful spectacles, legal lynchings; a *post*-republic, imperial carnival in

which the character of jurists, educators, healers, ordinary citizens, heroes or saints may be thrown, *gagged and silenced,* to the lions of the mass media; to be assassinated for sport or special interest. In the seat of the emperor, unchecked to turn thumb's down on their victim in the political-pogrom-of-the-hour, sits the elite of the fourth estate, protected and empowered by their sycophant Praetorian Guard, *the FCC.* (App. 163a ~ 165a).

Did not the framers make the Justices immune from the vagaries of politics and pelf so that the Courts would be the aegis, the shields, the defenders of the People's rights in the days of such unbridled abuse? (Article III, §1).

e.g., ex parte Milligan, 4 Wall 2 (1866) (App. 106a).

Unless this rapid erosion of our fundamental rights is reversed, will we not come to the place where purported "law" is the absolute sovereignty of the state over individual rights and interests; buttressed by a virtual *Ministry of Truth*, an imperial bureaucracy serving the interests of a tiny elite of privileged, *private* special interests, protected and empowered by *state* officials: *a literal,* by definition, *corporate-state-fascism (Lutto v. Field),* a "politically correct," Orwellian-thought-police, that effectively decides 99.9% of what the American people shall be permitted *or denied* the right to hear, to know ... and ultimately decreeing what we must *not*-speak, *non*speak, *new*speak; "think," *un*think, *new*think, *non*think and *double not-think!*? (App. 50a; 57a; 101a; 153a; 159a; 192a).

To evade resolving the underlying constitutional questions, to view this case as mere hair splitting of technical niceties, rather than an opportunity to remedy a deadly threat to our free constitutional Republic under law, is to strain at gnats while swallowing camels, to exalt form over substance, *"to suffer tamely a lawless attack upon our liberty."* (App. 98a, 235a). [17]

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[17] "... [T]his Court cannot and should not assume any exemption *when duty requires it to decide a case in conformance with the Constitution.* A willing breach of it would be nothing less than a breach of faith, and no Court that broke its faith with the people could sensibly expect credit for principle in the decision by which it did that." [Italics added.]

Planned Parenthood v. Casey, 112 S.Ct. at 2815-16 (1992); *cf.*, *CBS. v. DNC*, 93 S.Ct. 2087; 412 U.S. at 103; (App. 89a; 108a; 131a; 172a; 175a; 224a; 232a).

Nor is there any doubt as to the ability of this Court to grant plenary relief as demanded by the circumstances. *Franklin v. Gwinnett County Public Schools*, __ U.S. __, 112 S.Ct. 1028 (1992); (App. 127a, 128a; 175a; 229a).

"A popular Government, *without popular information, or the means of acquiring it,* is but a Prologue to a Farce or a Tragedy; or, perhaps both." James Madison, Chief Author of The Bill of Rights and The First Amendment.

CONCLUSION

This Court should reaffirm the paramount First Amendment Rights of the People, because they are preservative of all rights; and the rights of the individual candidates are so overriding, *juris et de jure*, for the vital interests of maintaining constitutional government that the FCC must forthwith comport its procedures and rulings with the clear letter and spirit of § 312 and § 315 of Title 47 in favor of the originally intended free and equal access, with a clear directive that if FCC cannot rule with finality in a *timely* and lawful manner, the presumption must be in favor of any candidate to be given equal opportunity to present his or her views.

And, that a Citizen, who has been harmed or deprived of the basic rights these statutes were enacted to preserve, such as a candidate whose ads are censored, is entitled to remedy at law without the burden of first submitting to endless, useless, idle rituals of pointless futility before the injured party may exercise his express rights to seek justice in an action at law, suit in equity, or other proper proceeding for redress.

And, the people, whose paramount rights are violated, are entitled to redress; or at least to be protected by requiring the FCC to immediately suspend the license for probable cause of any broadcaster that censors a political ad and/or abuses an exemption to suppress candidates and viewpoints, under penalty of permanent revocation and exemplary fines.

And, in particular, the petitioner, under the especial set of facts in this matter, is entitled to go to trial with his case against the defendants forthwith, or as soon as may be practicable with no clock of limitations tolling against him.

And, such other relief as this honorable Court may deem just and proper.

May God, Who is Just, have Mercy upon this Honorable Court and upon this Nation.

Respectfully submitted,
Ralph P. Forbes
Petitioner in his own proper person